No. 79-813

MICHAEL RODAK, JR.,

In the Supreme Court of the United States

OCTOBER TERM, 1979

AMERICAN COMMERCIAL LINES, INC., PETITIONER

v.

THOMAS W. GRIFFITH AND
WHEELING-PITTSBURGH STEEL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

QUESTION PRESENTED

Whether Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act establishes a general negligence standard in suits by longshoremen against vessel owners.

STATUTE INVOLVED

Section 5(b) of the Longshorhmen's and Harbor Workers' Compensation Act, as added by Section 18(a) of the Longshoremen's and Harbor Workers' Compensation

Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1263, 33 U.S.C. 905(b), provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT

On May 26, 1973, respondent Thomas Griffith, a longshoreman in the employ of respondent Wheeling-Pittsburgh Steel Corporation ("Wheeling"), was injured while loading a coal barge owned by petitioner. The accident occurred when Griffith and others attempted to close the barge covers, which were difficult to move because "[t]he wheels and track mechanism on which the covers ordinarily roll were without lubrication and were rusty and bent" (Pet. App. 5a). In order to close one of the defective barge covers, the stevedore crew attached a

cable to the cover from a crane located on the seawall. Because the eyelets on the center of the cover were missing, Griffith and another employee had to stand on the cover to keep the cable hooks in place under the rim of the cover. When tension was applied to the cable, the cover began to rise and Griffith and the other employee stepped back onto another cover. That cover moved, however, and both longshoremen fell into the ship's hold, sustaining injuries (Pet. App. 3a-5a, 15a-16a).

Thereafter, Griffith filed suit in the United States District Court for the Western District of Pennsylvania against petitioner and Wheeling under Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), as added by Section 18(a) of the LHWCA Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1263, 33 U.S.C. 905(b). He claimed that petitioner, as owner of the barge, and Wheeling, as *pro hac vice* owner of the barge,[1] were liable for their negligence in connection with the defective barge cover. The district court granted Wheeling's motion for summary judgment (384 F. Supp. 230 (1974)), but the court of appeals reversed and remanded the case for further proceedings against both defendants (521 F. 2d 31 (1975), cert. denied, 423 U.S. 1054 (1976)).

Following a bench trial on remand, the district court held that both petitioner and Wheeling were negligent and that Griffith had suffered more than $200,000 in damages. The court first concluded that the critical question in a longshoreman's suit under Section 5(b) is whether the vessel owner had exercised due care under all the attendant circumstances. The court rejected petitioner's

[1]Three days prior to the accident, petitioner had delivered the barge to Wheeling for use in its coal fleet (Pet. App. 4a).

contention that Section 5(b) imposes on vessel owners only the limited duty owed by a land owner to an invitee (see *Restatement (Second) of Torts* §§ 343 and 343A (1965)) rather than the general duty of care applicable in ordinary negligence actions (Pet. App. 32a-34a). Focusing on petitioner's delivery of a barge with a defective and rusted cover, the court further noted that petitioner's "pervasive and flagrant" negligence would satisfy either standard (*id.* at 35a). Finally, the court found that petitioner had been 50% responsible for the accident and that Wheeling had also been 50% responsible—25% in its capacity as *pro hac vice* owner and 25% as stevedore (*id.* at 41a).[2]

All parties appealed, and the court of appeals affirmed in part and reversed in part (Pet. App. 1a-25a; 610 F. 2d 116). Concluding that petitioner's restrictive interpretation of Section 5(b) was inconsistent with both congressional intent and the relevant decisions of this Court (Pet. App. 11a-14a),[3] the court of appeals held that Section 5(b) "imposes on vessel owners the same duty to exercise 'reasonable care under the circumstances of each case'

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[2]The district court correctly concluded that Wheeling as an employer was not liable to Griffith for its actions as stevedore. It erroneously held, however, that Griffith could not recover from petitioner or Wheeling as *pro hac vice* owner that portion of his damages attributable to his employer's negligence. See *Edmonds* v. *Compagnie Generale Transatlantique*, No. 78-479 (June 27, 1979). The court of appeals reversed this aspect of the district court's order (Pet. App. 5a-7a).

[3]See *Edmonds* v. *Compagnie Generale Transatlantique*, *supra*; *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

that would be applicable to a land based business" (*id.* at 14a). The court stated that (*id.* at 14a-15a):

> the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger.

Applying this standard to the facts of the case, the court of appeals agreed with the trial judge that petitioner had been negligent in delivering a barge with a rusted, defective cover (*id.* at 15a-16a). With regard to Wheeling's proportionate fault and status as *pro hac vice* owner, however, the court of appeals remanded the case for further findings (*id.* at 17a-20a, 23a-24a). See also note 2, *supra*.[4]

DISCUSSION

Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, as added in 1972, provides that a vessel owner is liable to a longshoreman for an "injury * * * caused by the neligence of a vessel." 33 U.S.C. 905(b).[5] Congress did not specify the precise

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[4]These other issues are not before the Court.

[5]In 1972, Congress amended the LHWCA to relieve vessel owners of absolute liability for the unseaworthiness of their vessel. At the same time, Congress made clear that vessel owners would continue to be responsible for their negligent acts and omissions. See H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 4-8 (1972); *Bloomer* v. *Liberty Mutual Ins. Co.*, No. 78-1418 (Mar. 3, 1980), slip op. 9; *Edmonds* v. *Compagnie Generale Transatlantique*, *supra*, slip op. 5.

standard of negligence to be applied in actions brought under Section 5(b), however, and the courts of appeals have formulated different approaches to the question of owner liability. Relying on *Restatement (Second) of Torts* §§ 343 and 343A (1965), several courts of appeals have concluded that Section 5(b) renders a vessel owner liable only in those circumstances in which an owner of land would be accountable to an invitee. See, *e.g.*, *Gay* v. *Ocean Transport & Trading, Ltd.*, 546 F. 2d 1233, 1237-1238 (5th Cir. 1977); *Anuszewski* v. *Dynamic Mariners Corp.*, 540 F. 2d 757, 759 (4th Cir. 1976), cert. denied, 429 U.S. 1098 (1977); *Napoli* v. *Hellenic Lines, Ltd.*, 536 F. 2d 505, 508-509 (2d Cir. 1976). More recently, other courts of appeals, including the court below, have rejected the analogy between a land owner and a vessel owner and instead have concluded that Section 5(b) imposes a general duty on vessel owners to exercise reasonable care in all circumstances. See, *e.g.*, *Johnson* v. *A/S Ivarans Rederi*, 613 F. 2d 334, 346-349 (1st Cir. 1980); *Santos* v. *Scindia Steam Navigation Co.*, 598 F. 2d 480, 489-491 (9th Cir. 1979), petition for cert. pending, No. 79-512.

Despite this apparent conflict among the courts of appeals, we submit that plenary review of this case by the Court is unwarranted. First, it is unlikely that the different standards articulated by the courts of appeals would produce different results in the large majority of cases.[6] Under neither standard can a vessel be held liable

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[6]As an abstract matter, we believe that the court of appeals has correctly construed Section 5(b). Although Congress indicated that Section 5(b) incorporates "land-based" principles of negligence (see, *e.g.*, H.R. Rep. No. 92-1441, *supra*, at 4, 6; *Luhrano* v. *Royal Netherlands Steamship Co.*, 572 F. 2d 364, 366 (2d Cir. 1978)), it did not state that vessel owners should be treated as land owners in all circumstances. To the contrary, the language and legislative history of Section 5(b) strongly suggest that Congress intended the courts to

unless it fails to exercise reasonable care to protect the longshoremen against a danger that was known or could have been known to it. Likewise, under neither standard can a vessel be held liable solely because of the stevedore's negligence. And even under § 343A of the *Restatement*, a vessel may in some circumstances be liable for injuries caused by an open and obvious danger to a longshoreman despite the fact that the danger was created by the stevedore. See, *e.g.*, *Canizzo* v. *Farrell Lines, Inc.*, 579 F. 2d 682, 685-686 (2d Cir.), cert. denied, 439 U.S. 929 (1978); *Chavis* v. *Finnlines, Ltd.*, 576 F. 2d 1072, 1078-1079 (4th Cir. 1978); *Wiles* v. *Delta Steamship Lines, Inc.*, 574 F. 2d 1338 (5th Cir. 1978); *Lubrano* v. *Royal Netherlands Steamship Co.*, 572 F. 2d 364 (2d Cir. 1978), on remand, No. 79-7228 (2d Cir. Mar. 31, 1980); *Gay* v. *Ocean Transport & Trading, Ltd.*, *supra*, 546 F. 2d at 1240-1242. But cf. *Cox* v. *Flota Mercante Grancolombiana*, 577 F. 2d 798 (2d Cir.), cert. denied, 439 U.S. 881 (1978).[7]

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apply general negligence principles in these cases. See H.R. Rep. No. 92-1441, *supra*, at 4-8. As the court of appeals pointed out (Pet. App. 12a-14a), that conclusion also seems more consistent with this Court's analysis in *Edmonds* v. *Compagnie Generale Transatlantique*, *supra*, and *Kermarec* v. *Compagnie Generale Transatlantique*, *supra*, 358 U.S. at 630-632, and with Congress' intent to reject common law rules of contributory negligence and assumption of risk. See generally *Johnson* v. *A/S Ivarans Rederi*, *supra*, 613 F. 2d at 337-349. Finally, adoption in this context of the limitations imposed on a landowner's liability to an invitee "would undercut Congress' intention to reduce the frequency of accidents by creating economic incentives to provide safer working conditions." *Santos* v. *Scindia Steam Navigation Co.*, *supra*, 598 F. 2d at 487.

[7]Indeed, it has been suggested that *Restatement (Second) of Torts* § 343A (1965) may be an inappropriate guide because it constitutes too liberal a standard of liability. See *Riddle* v. *Exxon Transportation Co.*, 563 F. 2d 1103, 1112-1113 (4th Cir. 1977); *Hurst* v. *Triad Shipping Co.*, 554 F. 2d 1237, 1249-1250 n.35 (3d Cir.), cert. denied, 434 U.S. 861 (1977); *Canizzo* v. *Farrell Lines, Inc.*, *supra*, 579 F. 2d at 688 (Friendly, J., dissenting).

More important, even assuming that the disagreement among the courts of appeals is a matter of substance rather than semantics, this case does not present an occasion to resolve the conflict. As the district court noted and as the facts clearly show (Pet. App. 9a, 33a-34a, 35a), petitioner's negligent behavior in delivering a rusted, defective, and therefore hazardous vessel would constitute a basis for liability under either standard. See, *e.g.*, *Johnson* v. *A/S Ivarans Rederi*, *supra*, 613 F. 2d at 351; *Santos* v. *Scindia Steam Navigation Co.*, *supra*, 598 F. 2d at 489-490; *Canizzo* v. *Farrell Lines, Inc.*, *supra*, 579 F. 2d at 685; *id.* at 688 (Friendly, J., dissenting); *Chavis* v. *Finnlines, Ltd.*, *supra*; *Lubrano* v. *Royal Netherlands Steamship Co.*, *supra*; *Brown* v. *Mitsubishi Shintaku Ginko*, 550 F. 2d 331, 334 (5th Cir. 1977); *Bess* v. *Agromar Line*, 518 F. 2d 738, 741 & n.8 (4th Cir. 1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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